# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DAMOND JOHNSON,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 266174
Wayne Circuit Court
LC No. 05-007896-01

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life in prison without parole for his first-degree premeditated murder conviction and a consecutive term of two years in prison for his felony-firearm conviction. We affirm.

I

On appeal, defendant argues that the evidence is insufficient to support his convictions. We disagree. In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of first-degree premeditated murder are that "defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); MCL 750.316(a). Defendant contends that there was insufficient evidence that his fatal shooting of his live-in girlfriend, Tyrie Lowe, was premeditated and deliberate because evidence established that he shot her during the heat of an argument and that he acted in self-defense.

Premeditation and deliberation require sufficient time for a second look, and an actor's state of mind may be proved from minimal circumstantial evidence. *Id*; *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). "Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's

actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Anderson*, *supra* at 537.

Defendant shot Lowe in the middle of the forehead, at close range. According to defendant's testimony and his statements to the police, when he came home from drinking at a bar in the early morning hours, he and Lowe got into a heated argument. Defendant was tired and just wanted to go to bed, which he did. He was later awakened by "a sharp pinching pain" when Lowe nicked the back of his leg with a knife; their argument resumed, with Lowe swiping at him with the knife. Lowe stormed out of the bedroom into the living room, telling defendant to get up and finish what he started. Defendant stated that because he was scared, he got out of bed and got a gun for protection from the bedroom closet, then went into the living room, planning to leave the house. Lowe told defendant, "you ain't going to sho[o]t me you [expletive]." As he was looking for his clothes, Lowe lunged at him with the knife, and he was so scared that he pulled the trigger. He was approximately two feet away from her when he shot her.

Defendant contends that his testimony and his statements to the police require a conclusion that he shot Lowe "in the heat of the moment," consistent with an unpremeditated death. However, considering the overall evidence in the light most favorable to the prosecution, a rational trier of fact could properly conclude that defendant killed Lowe deliberately and with premeditation.

Although defendant claimed that Lowe had a knife, and had swiped him several times with it during their argument, no knife was found in the living room, where she was killed. He claimed that he shot Lowe when she lunged at him with a knife, but he admitted, and evidence showed, that he shot her in the center of the forehead at close range. Further, defendant claimed that he retrieved the gun for protection, but the evidence established that Lowe was only five feet tall and weighed 109 pounds, much smaller than defendant. In his statement to the police in which he admitted shooting Lowe, defendant did not mention that he shot Lowe in self-defense. Rather, he stated that he tried to scare Lowe by pointing the gun at her, and she said, "you ain't going to sho[o]t me . . .,"; he could not stand it anymore, and he "raised the gun" and shot her. Defendant further elaborated in his statement that in shooting Lowe, he "made a horrible judgment call."

Given that a few seconds may be sufficient time for a second look, *People v Glover*, 154 Mich App 22, 29; 397 NW2d 199 (1986), a rational trier of fact could conclude that defendant deliberately killed Lowe with premeditation when he raised the gun and shot her in the living room, in the middle of the forehead, at close range under the circumstances presented. Likewise, as the prosecutor pointed out in her argument, the circumstances of the shooting, as well as defendant's statements and his actions following the shooting, were inconsistent with his claim of self-defense. He fled to his mother's house after the shooting, leaving his three children. He later returned to his home to retrieve the gun, and then went with his mother's boyfriend to dispose of the gun in the river. He called 911 to report the shooting. He did not indicate to anyone that he shot Lowe in self-defense and did not report the knife wounds as the reason for the shooting. Rather, he stated that he shot her because he could not take Lowe's harassment anymore.

Although there may have been testimony to support defendant's claim that the shooting was not premeditated and deliberate, and that he shot Lowe in self-defense, there was also testimony and other evidence to support a contrary conclusion. It is the role of the jury, rather than this Court, to evaluate witness credibility. *Wolfe*, *supra* at 514-515. Further, the prosecution need not negate every reasonable theory of innocence, but only prove the case beyond a reasonable doubt despite any contradictory evidence, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Accordingly, the contrary evidence does not negate the conclusion that sufficient evidence exists to support defendant's convictions.

Sufficient evidence exists to support defendant's first-degree murder conviction. In addition, given that defendant used a firearm to commit first-degree murder, sufficient evidence also exists to convict defendant of felony-firearm. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (to be guilty of felony-firearm, a defendant must possess a firearm during the commission or attempted commission of a felony); MCL 750.227b.

II

Defendant next argues that he is entitled to reversal because the prosecutor improperly questioned him regarding the credibility of other witnesses who had testified and improperly argued issues of witness credibility during her closing argument. We disagree.

This Court reviews unpreserved issues of prosecutorial misconduct for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Defendant must show that there was plain error that affected his substantial rights, i.e., that the error was outcome determinative. *Aldrich*, *supra*; *Carines*, *supra* at 763. To warrant reversal, the error must result in the conviction of an innocent defendant or must seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id*. If a curative instruction could have alleviated any prejudicial effect, there is no error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context, on a case-by-case basis. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). In addition, a prosecutor may argue reasonable inferences arising from the evidence. *Id*. at 282. However, "[a] prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses because a defendant's opinion of their credibility is not probative." *Ackerman*, *supra* at 449.

Defendant claims that he was denied a fair trial due to the prosecutor's questions during his cross-examination and rebuttal argument. This argument fails. During cross-examination, defendant denied: 1) that he told Zwicker, "I couldn't stand it anymore. I raised the gun and I shot [Lowe]"; 2) that he told the officer who transported him to the Third Precinct that he shot Lowe because he was "pissed" at her; or 3) that he went to put some pants on after the shooting. In response to each denial, the prosecutor asked defendant whether the witnesses, who had testified otherwise, were lying. Because this line of questioning asked defendant to comment directly on witness credibility, it was improper. *Id*. at 449. However, this questioning did not result in error requiring reversal under the standard in *Carines*, particularly given the trial court's instruction to the jury that it was to determine issues of witness credibility. *Id*. at 448-449.

Further, defendant could have requested a curative instruction that would have alleviated any prejudice. *Id*. at 449.

Defendant also claims that the prosecutor improperly argued issues of witness credibility during her rebuttal argument. This argument also fails. It is improper for a prosecutor to "vouch for the credibility of [prosecution] witnesses to the effect that [the prosecutor] has some special knowledge concerning a witness' truthfulness." *Bahoda*, *supra* at 276. However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Viewing the prosecutor's comments in context, the prosecutor was not personally vouching for the credibility of her witnesses by implying some personal knowledge of their truthfulness. Rather, the prosecutor was arguing to the jury in a rhetorical manner that, considering the evidence, the police officers had no reason to fabricate their testimony and were more credible than defendant. Therefore, the prosecutor's comments were not improper. Moreover, any prejudice could have been alleviated by a curative instruction in response to a timely objection. *Id*. at 455.

Defendant further claims that trial counsel's failure to object to the prosecutor's questioning and rebuttal argument denied him the effective assistance of counsel. However, because the prosecutor's arguments were not improper, any objection would have been futile. Counsel is not ineffective for failing to make futile objections. *Ackerman*, *supra* at 455. Moreover, as noted above, defendant has failed to show that he was prejudiced by the prosecutor's cross-examination or argument, and therefore he has failed to carry his burden of demonstrating ineffective assistance. *Thomas*, *supra* at 457.

III

Defendant next argues that the trial court should have suppressed his statement to police, which was taken in violation of his constitutional rights. We disagree. This Court reviews the trial court's factual findings on a motion to suppress evidence for clear error. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999). Clear error exists when, after reviewing the entire record, this Court "is left with a definite and firm conviction that a mistake has been made." *People v Swirles* (*After Remand*), 218 Mich App 133, 136; 553 NW2d 357 (1996). However, this Court reviews de novo the trial court's conclusions of law and ultimate decision on a motion to suppress evidence. *People v Garvin*, 235 Mich App 90, 96-97; 597 NW2d 194 (1999).

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). "[W]hen an accused invokes the right to have counsel present during a custodial interrogation, the accused is not subject to further interrogation by the police until counsel has been made available, unless the accused initiates further communication, exchanges, or conversations with the police." *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001), citing *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

Here, even though defendant was read his *Miranda*[1] rights and requested the presence of counsel, the police did not take a statement from him until after he indicated, "Let's just do this, let's get it over with." Therefore, because defendant initiated further communication with police, the trial court did not err in denying defendant's suppression motion. *Adams*, *supra* at 237, 239.

Defendant argues that his statement, "Let's just do this, let's get it over with," was only made in response to improper police interrogation after he asserted his right to counsel. For purposes of *Miranda*, the interrogation of a defendant includes both express questioning and its "'functional equivalent.'" *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998), quoting *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). "The 'functional equivalent' of interrogation includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Kowalski*, *supra* at 479, quoting *Innis*, *supra* at 301.

Defendant stated, "Let's just do this, let's get it over with," in response to the police telling him that they were unable to reach the defendant's attorney and that they would return defendant to the Third Precinct. The police comments did not involve express questioning and cannot be said to be likely to elicit an incriminating response, and thus they did not constitute further interrogation in violation of defendant's right to counsel. After defendant indicated that he wanted to make a statement, Officer Zwicker even asked defendant if he was sure of this decision. Defendant responded that he was sure. We find no error.

IV

Defendant next argues that reversal of his conviction is required since the trial court failed to sua sponte instruct the jury that, regarding self-defense, defendant had no duty to retreat because he was attacked in his own home. We find no basis for reversal.

Because defendant failed to either request the omitted instruction or object to the trial court's failure to give it sua sponte, defendant is precluded from seeking appellate relief on this ground. *People v Gonzalez*, 468 Mich 636, 642; 664 NW2d 159 (2003), citing MCL 768.29 and MCR 2.516(C). Defendant's claim of error is forfeited, and we find no plain error affecting defendant's substantial rights because the duty to retreat was not at issue in this case, and defendant was not prejudiced by the omission of the instruction. *Gonzales*, *supra* at 643.

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).